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October 8, 2009



SENT VIA FEDERAL EXPRESS

The Honorable Anne Quinlan, Acting Secretary

Surface Transportation Board

395 E. Street, SW

Washington, DC 20423-0001

Re: Allegheny Valley Railroad Company – Petition for Declaratory Order
STB Finance Docket No. 35239

Dear Acting Secretary Quinlan:

Enclosed for filing please find an original and ten copies of the Response of Allegheny Valley Railroad Company to the September 17, 2009 Order of the Surface Transportation Board. Copies of this Petition have been served on all parties of record.

Please time stamp the copy of this letter as proof of filing and return it to the undersigned in the prepaid, self addressed stamped envelope provided. If there are any questions regarding this Response, please contact the undersigned.

Very truly yours,

RICHARD R. WILSON, P.C.

Richard R. Wilson, Esq.

Attorney for Allegheny Valley Railroad Company

RRW/bab

Enclosure

xc: Allegheny Valley Railroad Company
All Parties of Record

225844

Before the
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO: 35239

ALLEGHENY VALLEY RAILROAD COMPANY-
PETITION FOR DECLARATORY ORDER



RESPONSE OF ALLEGHENY VALLEY RAILROAD COMPANY TO THE
SEPTEMBER 17, 2009 ORDER OF THE SURFACE TRANSPORTATION BOARD

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Dated: October 8, 2009

Before the
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO: 35239

ALLEGHENY VALLEY RAILROAD COMPANY-
PETITION FOR DECLARATORY ORDER

RESPONSE OF ALLEGHENY VALLEY RAILROAD COMPANY TO THE
SEPTEMBER 17, 2009 ORDER OF THE SURFACE TRANSPORTATION BOARD



I. INTRODUCTION

On September 17, 2009, the Surface Transportation Board issued an Order to the parties in the above captioned proceeding requesting that they file a response addressing whether or how the recent decision by the United States Court of Appeals for the District of Columbia Circuit in Consolidated Rail Corporation v. STB, 571 F3d. 13 (D.C. Cir. 2009)(the Harsimus decision) affects this proceeding including whether the Board has jurisdiction to resolve the parties' dispute. The Board initially set the due date for this response on October 2, 2009 but at the request of Petitioner's counsel, extended that filing date to October 9, 2009.

II. SUMMARY

The decision of the District of Columbia U.S. Circuit Court of Appeals in Consolidated Rail Corporation v. STB, 571 F3d. 13 (D.C. Cir. 2009) is constrained by the facts of that case which required an interpretation of the Final System Plan in order to determine whether the disputed line conveyed to Conrail was a "rail line" which was subject to STB abandonment authorization or a "spur" for which no abandonment authorization was required. In AVRR's Petition for Declaratory Order proceeding, no

interpretation of the Final System Plan or a Special Court conveyance order is necessary with respect to the track and right of way extending from Railroad Street between 16th Street and 21st Street in the Pittsburgh Strip District because the dispositive legal issue before the Board is the nature of Conrail's and AVRR's post 1976 use of the railroad easement and AVRR's intended future use of that line segment for rail freight and passenger service as part of AVRR's main line track. Thus the legal and factual issues presented for the Board's determination post date the 1976 Final System Plan conveyance to Conrail and requires no interpretation of the Plan or the orders of the Special Court.

III. LEGAL ARGUMENT

A. The facts of the Harsimus decision are distinguishable from those presented in the AVRR Declaratory Order proceeding.

As described in the Harsimus decision and as set forth in greater detail in Conrail's Appellate Brief, Conrail sold the disputed Embankment line in July 2005 to a developer without obtaining prior STB abandonment authority. Moreover, Conrail did not retain an easement for railroad use of the Embankment line as it did for other properties in Jersey City where it was necessary for Conrail to continue serving remaining shippers. 2009 W.L. 393598, p.7. In their pleadings before the Board and on appeal, Conrail and the developers asserted that the Embankment line was not acquired by Conrail under the Final System Plan and the Special Court conveyance orders as a "rail line" under "Line Code 1420" but was an ancillary spur or yard track which could be abandoned without regulatory approval under 49 U.S.C. §10906. Furthermore, Conrail and the developer maintained that there was no post 1976 change in the operation and use of the Embankment line which would resubject the line to STB abandonment

jurisdiction as a “line of railroad.” The law is clear that the measure of whether a particular track is subject to the STB’s abandonment authority is how the railroad has used it – as a “line of railroad” or as a spur or yard track. Nicholson v. ICC, 711 F2d 364, 367 (D.C. Cir. 1983).

It was therefore necessary in the Harsimus case, in the absence of any post 1976 change in the use of the Embankment track, for the finder of fact to interpret the status of that line under the Final System Plan in order to determine if Conrail’s 2005 sale of the line required prior STB abandonment authorization. The DC Circuit Court of Appeals concluded that only the D.C. Federal District Court had jurisdiction to decide that issue under 45 U.S.C. §719(e)(2).

The DC Circuit Court of Appeals was careful to circumscribe the application of its decision:

In other proceedings, the nature of the trackage may be contested but resolution of the issue would not require interpretation of the FSP or the Special Court’s conveyance orders and thus would not implicate the Special Court’s (now District Courts) exclusive jurisdiction. See e.g. Chelsea Property Owners, 8 ICC 2d 773, 789-91 (1992) (concluding trackage was “rail line” subject to abandonment authorization and not “spur” without reference to the FSP or conveyance orders.) Only in proceedings in which the Board’s authority is challenged and an interpretation of the FSP or the Special Court’s conveyance order under 45 U.S.C. §719(e)(2) is required does the Board lack jurisdiction to resolve the question of the nature of the trackage sought to be abandoned.

Thus, the Harsimus decision holds, on its face, that where it is necessary to interpret the Final System Plan or a Special Court conveyance order in order to determine the disputed character of a track, jurisdiction to decide that issue rests in the D.C. Federal District Court.

B. In contrast to the Harsimus decision, the facts presented in the AVRR Declaratory Order proceeding do not implicate or require an interpretation of the Final System Plan or a Special Court conveyance order to resolve the parties' dispute.

Unlike the ex post facto attempt to challenge Conrail's 2005 sale of the Embankment line to a developer, in the AVRR/Buncher proceeding, Buncher acquired its parcel from Conrail on July 20, 1983 subject to a perpetual rail easement retained by Conrail between 16th and 21st Streets which was specifically set forth in the Deed of Conveyance. Moreover, AVRR's evidence establishes that both Conrail and AVRR held and hold title to the easement for continued branch or mainline railroad use as indicated by their post 1976 tariff publications, track charts, ZTS maps, verified statements and the conveyance of the rail easement by Conrail to AVRR in 1995 as part of AVRR's new line of railroad. Based on these post 1976 facts and the Board's decisions in Effingham Railroad Company – Petition for Declaratory Order – Construction in Effingham, IL, STB Docket No. 41986 (STB served September 18, 1998), aff'd sub. num. United Trans. Union – Ill. Legislative Bd. v. STB, 183 F.3d 606, 613-14 (7th Cir. 1999); Sierra Pine – Lease and Operation Exemption – Sierra Pacific Industries, STB Finance Docket No. 33679, Slip Op. at 4 (STB served November 27, 2001); and Honey Creek Railroad, Inc. – Petition for Declaratory Order, STB Finance Docket No. 34869 (Service date June 4, 2008) Slip Op. at p. 8-9, no interpretation of the 1976 Final System Plan or a Special Court conveyance order to Conrail is required for the Board to find that the rail easement is part of AVRR's line of railroad and that AVRR may reinstate rail common carrier freight and passenger service between 16th and 21st Streets over the perpetual rail

easement acquired from Conrail in 1995 pursuant to an Exemption Notice issued by the ICC in ICC Finance Docket 32783.

Moreover, Buncher's assertion that Conrail abandoned its perpetual easement in February 1984 (after specifically retaining it in July 1983) by the removal and/or covering over its track is contrary to STB decisional law (See Honey Creek, Slip Op. at 6-7). Similarly, Buncher's arguments regarding the scope of Conrail's 1984 NERSA abandonment of the Smallman Street track and whether the information filed by Conrail with the Board in that abandonment proceeding encompassed the track and right of way between 16th and 21st Street likewise raise new post 1976 issues totally unrelated to the Final System Plan or Special Court conveyance orders.

It is a historical fact that the disputed track and right of way between 16th and 21st Streets in the Strip District was conveyed to Conrail pursuant to the Final System Plan, but that is true of every inch of track and right of way acquired by Conrail in 1976. Moreover, the historical evidence submitted by AVRR and Buncher pertains not to whether the track and right of way between 16th and 21st Street was a "rail line" for purposes of the Final System Plan, but rather to the use and operation of the disputed track by AVRR and its predecessors in interest under Nicholson as well as the construction and subsequent removal of adjacent track facilities that comprised the Pittsburgh Produce Yard between 1900 and 1995.

Thus, unlike Harsimus, the dispute in AVRR's Petition for Declaratory Order proceeding focuses on the 1983 retention of a perpetual rail easement by Conrail, the conveyance of that easement by Conrail to AVRR in 1995 and Conrail's and AVRR's use and/or intended use of the disputed track and right of way extending from Railroad

Street between 16th and 21st Streets subsequent to 1976. Accordingly, the status of the line under the Final System Plan and a Special Court conveyance order is totally irrelevant because whatever that status may have been in 1976, it is the actions and conduct of the railroads subsequent to that date and AVRR's acquisition and use of that right of way as the western end of its main line of railroad that are the despositive legal issues before the Board in this proceeding. Those post 1976 activities, conduct and transactions by both Conrail and AVRR fall squarely within the exclusive jurisdiction of the Surface Transportation Board under 49 U.S.C. §10501 and do not fall within the Special Court jurisdiction of the D.C. Federal District Court.

C. Buncher's resort to the FSP and the Special Court conveyance order for Line Code 2229 does not deprive the Board of jurisdiction because no interpretation of those documents is required to resolve this dispute.

In an effort to bolster its claim that the permanent rail easement between 16th and 21st Streets was abandoned by Conrail in the 1984 NERSA abandonment proceeding in AB167 (Sub. No. 558N), Buncher argues that those portions of Conrail's Valley Industrial Track identified in the abandonment application included all Conrail trackage between M.P. 0.0 and the north side of 21st Street because the USRA Line Code 2229 described in the FSP was comprised of only one "line of railroad" consisting of three contiguous segments, the first of which extended from "Pittsburgh 11th Street to Pittsburgh No. 57th Street M.P. 0.2-4.6." See Bucher Surrebuttal Statement, June 25, 2009 p. 7-8. However, this contention requires no consideration or interpretation of the FSP and Conrail's acquisition documents because it is Conrail's 1984 abandonment application which the Board must interpret and Conrail's abandonment application in

AB167 (Sub. No. 55N) does not refer to the FSP or Line Code 2229 or Conrail's acquisition deeds for purposes of identifying the track for which Conrail sought abandonment authority. Moreover, Conrail's 1984 abandonment application was filed nine years after FSP track descriptions were compiled during which time Mr. Street's and Mr. Peterson's testimony describes the changes in track configurations and Conrail operations that gave rise to Conrail's decision to abandon its tracks from the North Side of Pittsburgh over the lower deck of the Ft. Wayne Bridge and up Smallman Street to the north side of 21st Street. As explained by Mr. Peterson, this abandonment was filed to provide essential highway clearances for the long delayed construction of a missing link of Interstate 279 on the north shore of the Allegheny River and to eliminate the Smallman Street track adjacent to the Pittsburgh Produce Terminal which had been sold to the Urban Redevelopment Authority. Moreover, this abandonment was only filed after Conrail had reestablished the Brilliant Branch as a means for connecting its Pittsburgh/Philadelphia main line to the former Allegheny Valley Branch line into the Pittsburgh Strip District via Railroad Street which terminated at 16th Street. Thus, the tracks in Conrail's 1984 NERSA abandonment proceeding had no relationship to Conrail's and AVRR's continued operation of the line along Railroad Street into the Pittsburgh Strip District and did not encompass the railroad track and right of way between 16th and 21st Streets which is the disputed track in this proceeding. Finally, it simply defies rational business decision making to conclude that Conrail would reserve a perpetual rail easement on July 20, 1983 only to file for abandonment of that easement (which is not specifically described) in the application just six months later on February 1, 1984.

Thus, the 1975 track descriptions contained in the Final System Plan for Line Code 2229 have no relevance or probative value for purposes of identifying the tracks for which Conrail sought abandonment authority in 1984 and present no substantive dispositive issue in connection with this proceeding which would implicate the jurisdictional ruling in the Harsimus decision.

D. Even if an interpretation of the Final System Plan or a Special Court conveyance order were implicated in this proceeding, 45 U.S.C. §744(g) accords jurisdiction to the STB because the tracks and right of way at issue herein were in operation by Conrail for more than two years after implementation of the Final System Plan.

In the Harsimus decision, the court rejected STB assertion of its Section 10903 abandonment jurisdiction under 45 U.S.C. §744(g). However, the statutory analysis utilized by the DC Circuit Court of Appeals failed to distinguish between the Board's lack of licensing authority over spur and yard track under §10906 and the Board's exclusive preemptive jurisdiction over the "construction, acquisition, operation, abandonment, or discontinuance of spur and yard tracks" under 49 U.S.C. §10501(b)(2).

In construing Section 744(g), the DC Circuit Court of Appeals stated:

because the Board "does not have authority... over... abandonment... of spur, industrial, team, switching, or side tracks" 49 U.S.C. §10906, the Board's approval or denial of an abandonment application presupposes that the trackage for which abandonment is sought is "part of [the rail carrier's] railroad lines" subject to the Board's abandonment authority under §10903. In abandonment proceedings in which the Board's authority is not disputed based on the nature of the trackage, however, the issue of the tracks nature would presumably not arise."

But this tautologic rationale is based on the flawed premise that Section 10906 creates a regulatory void in the STB's jurisdiction over spur and yard tracks and ignores the

provisions of 49 U.S.C. §10501(b)(2) enacted by Congress in the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803. It also ignores decisions of other circuit courts of appeal which have construed the provisions of §10906 and 10501(b)(2) in pari materia so as to preclude the creation of a regulatory void with respect to spur and yard tracks. It was this purported regulatory void which Judge Henderson used to reject the ICC's jurisdiction over spur and yard tracks under §744(g). In so doing, the court thereby resurrected a conflicting federal district court regulatory jurisdiction over factual determinations concerning spur and yard tracks exclusively accorded to the STB by Congress in 1995. See United Transportation Union – Illinois Legislative Board v. STB, 183 F.3d 606 (7th Cir. 1999) (The §10906 no-authority language means no authority, not no jurisdiction. 183 F.3d at 612) and Port City Properties v. Union Pacific Railroad Company, 518 F.3d 1186 (10th Cir. 2008).

The 1995 ICC Termination Act revised Section 10501 to extend exclusive Federal authority over auxiliary tracks and facilities so that state and local governments could not assert regulatory jurisdiction over those tracks. In addition, the Congress specified the exclusivity of Federal remedies with respect to the regulation of rail transportation (including spur and yard tracks) in the STB while clarifying that this exclusivity was limited to remedies with respect to rail regulation – not State and Federal law generally. (Emphasis added.) Report on ICCTA, H.R. Rep. No. 104-422, 104th Cong. 1st. Sess. 167 (1995), U.S. Code Cong. and Admin. News 1995 p. 850, 1995 U.S.C.C. A. 850. However, the construction accorded to 45 U.S.C. §§719(e)(2) and 744(g) in the Harsimus decision failed to consider the STB's expanded and exclusive jurisdiction over the regulation of spur and yard tracks and remedies pertaining thereto and created a

conflicting regulatory jurisdiction in the D.C. Federal District Court which Congress had explicitly limited to a period of two years after implementation of the FSP. Thus, the court's construction of 45 U.S.C. §§719(e)(2) and 744(g) creates a regulatory jurisdictional conflict where none previously existed. This violates fundamental principles of statutory construction that require statutes be construed in pari material so as to effectuate the provisions of both. Moreover, where statutes unavoidably conflict, the most recently enacted statute controls.

At the conclusion of the Harsimus decision, the court states "in such a case, as here, we see no conflict between 45 U.S.C. §719(e)(2) and 49 U.S.C. §§10903 and 10906." Unfortunately, the court failed to look far enough and did not apprehend or resolve the regulatory jurisdictional conflict between 45 U.S.C. §719(e)(2) and 49 U.S.C. §10501(d)(2) which its construction created. Given these analytical deficiencies, the Harsimus decision should be limited to its facts and accorded little precedential weight.

IV. CONCLUSION

The District of Columbia U.S. Circuit Court of Appeals decisions in Consolidated Rail Corporation v. STB and Nicholson recognize that a railroad's operation and use of its tracks and right of way may change over time as the railroad responds to market changes, new shipper locations, removal or reconstruction of track facilities and mergers or sale of rail lines to other carriers. Yard tracks can be abandoned and removed without STB abandonment authority; a main line track can become part of or be operated through yard facilities constructed adjacent to it; and yard tracks can be upgraded and converted to main line use or taken out of service and held for future rail use. It has been thirty three years since rail assets were conveyed to Conrail by orders of the Special Court

pursuant to the Final System Plan and since 1976 the National Rail Transportation System has been massively downsized, altered and restructured under the deregulatory provisions of the Staggers Rail Act of 1981, Pub. Law 96-944, and the ICC Termination Act of 1995. Since 1976, Class I railroads have merged into eight major systems and hundreds of regional and short line railroads have been created, many from former Conrail properties such as AVRR.

The dynamic changes which have evolved in the railroad industry since 1976 confirm that the Final System Plan was not intended to freeze perpetually the jurisdictional status of yard and rail line tracks. Rather the purpose and implementation of the Final System Plan was to create an economically viable and responsive Northeast Rail System capable of perpetuating an efficient and flexible rail network to meet the changing needs of the communities and industries it served. As the years pass, only in the most unusual case, if any, will an interpretation of the Final System Plan or a Special Court conveyance order present dispositive issues for determination by the DC Federal District Court under 45 U.S.C. §719(e)(2). As indicated above, this AVRR Declaratory Order proceeding is not such a case.

Respectfully submitted,

RICHARD R. WILSON, P.C.

By: 

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CERTIFICATE OF SERVICE

I hereby certify that I have this 8th day of October, 2009 served a copy of the Response of Allegheny Valley Railroad Company to the September 17, 2009 Order of the Surface Transportation Board upon the following by first class United States Mail, postage prepaid:

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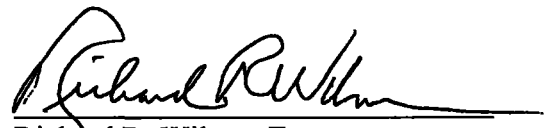
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